*COURT NO. 10*

**THE HIGH COURT OF UTTARANCHAL AT NAINITAL.**

Appeal from Order No. 613 of 2001
Old F.A.F.O. No. 926 of 1993

M/s United India Insurance Company Ltd.
Though its Divisional Manager,
Divisional Office 17. Edmonston Road, Allahabad.
… **Appellant.**

***Versus***

1. Smt. Sudha Lata Maithani, mother of late Sri Ved Prakash Maithani,
2. Km. Renu Maithani, sister of late Sri Ved Prakash Maithani, Both residents of Durga Bhawan, Narsingh Bari Almora, District Almora. (Claimants)
3. Almora Dugdh Utpadak Sahkari Sangh Ltd., Almora, Through its Chairman,
4. Almora Dugdh Utpadak Sahkari Sangh Ltd., Almora, Through its Prabandhak. (Opp. Parties)

… **Respondents.**

**Sri Naresh Pant, learned counsel for the appellant.**
**Sri G.B.Pande, Adv. Learned counsel for the claimant-respondents.**
**Ms. Sangeeta holding brief of Sri V.K.Bisht, Senior Adv., learned counsel for respondent no.4.**

**Date May 18, 2006**

**PC: Hon'ble B.S. Verma, J.**

This appeal has been preferred under Section 173 of the Motor Vehicles Act, 1988 (***in short the Act*** ) against the judgment and award, dated 24-10-2005, passed by the Motor Accidents Claims Tribunal/ Special Judge Nainital ( ***in short the Tribunal***), in M.A.C. Case No. 355 of 1989, Smt Sudha Lata Maithani and another Vs. Almora Dugdh Uptadak Sahkari Sangh Ltd. and others, whereby the learned Tribunal has allowed the claim petition and decreed the claim for compensation of Rs. 81,000/-along with interest @12% per annum as against the O.P nos. 1, 2 and 3 as mentioned in the impugned order. Aggrieved, the Insurance Company/O.P.No.3-appellant has come up in appeal.

Brief facts of the case are that Ved Prakash Maithani,

son of claimant no.1, aged 26 years and earning Rs. 1260.50 as his salary as clerk-cum-store keeper from his employer lost his life in a vehicular accident which occurred on 10-2-1989 at about 10 p.m. between Haldwani-Bareilly Road within police station Haldwani involving vehicle No. UHB-5250 (Swaraj Mazda), which was being driven rashly and negligently by its driver. The claimants being the mother and sister and dependents of the deceased have claimed compensation of Rs. 7,50,000/- from the opposite parties. The offending truck belonged to the Almora Dugdh Utpadak Sahakari Sangh and it was duly insured with the Insurance Company-appellant.

The Opposite Party Nos. 1 and 2, being owner of the vehicle, contested the claim petition by filing their written statement ( 14-Kha) inter alia on the ground that the deceased was not the employee of the answering Opposite Party; that the driver of the truck Pravin Kumar was not permitted by them to carry passengers other than the departmental employees and if he had carried unauthorised passenger in the truck in question, Pravin Kumar is personally liable for his act and the department had no concern with any liability; that the amount of compensation claimed is excessive.

The insurer of the vehicle-appellant also resisted the claim petition by filing its written statement asserting therein that the deceased Ved Prakash, the driver of the vehicle, himself violated the policy conditions, therefore, the insurer is not liable for compensation; that the driver was having a valid driving licence at the time of the accident and that the petition is defective for non-joinder of necessary party.

On the pleadings of the parties, the learned Tribunal framed as many as four issues in the case. After recording the evidence led by the parties, the learned Tribunal came to the

conclusion that the accident occurred due to rashness and negligence of the driver of the offending vehicle. The learned Tribunal on the issue of validly of driving licence came to the conclusion that the vehicle in question was being driven by a duly licensed driver and the driver was having a valid driving licence. The learned Tribunal further held that the owner of the vehicle opposite party nos. 1 and 2 were vicariously liable for the act of its driver. Ultimately, the claim petition was decreed for compensation of Rs. 81,000/- along with interest @ 12% per annum, as mentioned earlier.

In this appeal, the impugned award has been assailed mainly on the ground that the policy conditions were violated in the present case and the vehicle involved in the accident was a commercial vehicle, which was not meant to carry gratuitous passenger, therefore, the finding of the learned Tribunal fastening the liability upon the appellant to pay compensation is erroneous and against the evidence on record.

I have learned counsel for the parties and perused the entire material on record including the lower court record.

So far as the contention that the insured had violated conditions of the Insurance Policy is concerned, the argument of the learned counsel is not tenable for the reason that it was obligatory on the part of the insurance company to have established that it was within the knowledge of the insured that the drive engaged by the owner was violating the terms and conditions of the policy, but the record shows that no such evidence was led by the Insurance Company to substantiate its contention. Therefore, it was rightly held by the Tribunal that the employer was vicariously liable for the act done by its servant. The learned Tribunal has elaborately dealt with on this point. I see no reason to take a different view on this count.

Admittedly, the vehicle involved in the accident was a commercial vehicle, i.e. Swaraj Mazda. The contention of the appellant is that in the said vehicle only three passengers including the driver and cleaner were authorized to be carried in the said vehicle. This argument has been pressed into service on the basis of the testimony of the witness D.K.Verma, D.W.1. I have gone through the testimony of D.W.1. The insurance Company has produced D.W.1 Dinesh Kumar Verma, Clerk of the R.T.O. office Kathgodam. It is true that D.W.1 has stated in his examination-in-chief that in the offending vehicle the seating capacity was only for driver, cleaner and one passenger as per permit issued in respect of the vehicle involved in the accident. It is pertinent to mention that in the cross-examination, D.W.1 has clearly admitted that in the permit there is no mention of seating capacity of the vehicle. He further deviated from his stand by saying that he had wrongly stated that besides the cleaner and driver, only one person was authorized to be carried. In the last line of his cross-examination, D.W.1 clearly admitted that figure 3 in Form E denotes three passengers. Thus, the statement of the own witness of the appellant goes against it. The learned Tribunal has already dealt with elaborately on this point and rightly held that the deceased was the owner of the goods, who was traveling in the offending vehicle along with his house-hold goods. The appellant has failed to substantiate its contention even by documentary evidence. The deceased being the owner of the goods was fully covered by the Insurance Policy.

In the memo of appeal, the Insurance Company-appellant has challenged the impugned award on the point of rash and negligent driving as well as quantum of compensation. The record of the case reveals that the owner of the vehicle had contested the claim petition very hotly before the Tribunal. Moreover, it is not case of collusion between the claimant and the owner of the vehicle. No permission was sought from the Tribunal under Section 170 of the Act. In such circumstances, it is not open

to the Insurance Company to challenge the award passed by the Tribunal on the point of negligence or contributory negligence and also on the quantum of compensation in view of the law laid down by the Apex Court in the case of ***"National Insurance Company Ltd. Vs. Nicolletta Rohtagi and others"[( 2002) 7 S.C..C. 456].*** The appeal is not maintainable on this score. In that case, it has been observed by the Apex Court that ***"even if no appeal is preferred under Section 173 of 1988 Act by an insured against the award of a Tribunal it is not permissible for an insurer to file an appeal questioning the quantum of compensation as well as findings as regard negligence or contributory negligence of the offending vehicle".***

No other point was urged or argued before me in this appeal. I do not find any infirmity or illegality in the impugned award passed by the Tribunal.

In the result, the appeal has no force and deserves to be dismissed.

The appeal is dismissed. The impugned award dated 09-6-1993 is upheld. No order as to costs.

The amount in deposit with this Court, if any, be remitted to the Motor Accident Claims Tribunal concerned for being paid to the claimants.

**(B.S. Verma, J.)**

RCP